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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**Finance Docket No. 35504**

**UNION PACIFIC RAILROAD COMPANY – PETITION  
FOR DECLARATORY ORDER**

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ENTERED  
Office of Proceedings  
JAN 25 2012  
Part of  
Public Record

**OPENING COMMENTS OF CANEXUS CHEMICALS CANADA, L.P.**

Canexus Chemicals Canada, L.P. ("Canexus") hereby submits its Opening Comments in this proceeding, wherein the Union Pacific Railroad Company ("UP") seeks a declaration that Items 50 and 60 of UP Tariff 6607<sup>1</sup> are not unreasonable. Those tariff provisions require shippers of Toxic Inhalation Hazard ("TIH") commodities to indemnify UP against all liabilities except to the extent those liabilities are caused solely by the negligence of UP. Stated another way, these provisions make TIH shippers tendering rail cars to UP responsible for not only their own negligence, but for any liabilities arising from any cause whatsoever that is not otherwise solely attributable to UP, even if the shipper is not at fault, or the fault is of a third party.

**Identity of Canexus Chemicals Canada, L.P.**

Canexus is a privately owned limited partnership with offices in North Vancouver, British Columbia, Canada. Canexus manufactures and markets caustic soda, hydrochloric acid and chlorine at its main production facility located in North Vancouver. The North Vancouver facility produces for sale approximately 170,000 tons of chlorine per year, all of which must be transported to the customers of Canexus and Canexus U.S. Inc. - the latter which handles the sale

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<sup>1</sup> General Rules for Movement of Toxic or Poison Inhalation Commodity Shipments Over the Lines of the Union Pacific Railroad Company.

and distribution of the chlorine from the North Vancouver facility in the United States - by railroad. The chlorine, which is a TIH commodity, is transported to customers in Canada and the United States pursuant to common carrier and contract rail transportation service provided by UP, Canadian Pacific Railway, Canadian National Railway, and/or BNSF Railway Company, depending on the final destination. The chlorine is transported in specialized rail tank cars supplied by Canexus. UP is one of Canexus' largest rail carriers of chlorine.

### **Opening Comments of Canexus**

There is no dispute that chlorine is a critical component of the North American economies and it is used in the manufacture of products that Canadians and Americans rely on for their health, safety, security and defense. This Board has expressly recognized this fact, and has commendably stated that "[w]e are particularly cognizant of the need to maintain rail service for TIH or PIH materials, many of which are used for a variety of public purposes." *Canexus Chemicals Canada, L.P. v. BNSF Railway Co.*, FD 35554, (served October 14, 2011). Accordingly, it is well established that "[t]he safe and efficient shipment of TIH by rail is in the public interest." *Id.* The Board has made these findings in the face of an aggressive and public campaign by the railways in recent years to rid their systems of TIH commodities as much as possible.

In Canexus' view, the occurrence of three major TIH rail-related incidents between 2002 and 2005 dramatically changed the railways' perception of the risk of handling TIH products, even though all three incidents were attributed directly to the actions (or lack thereof) of the railways or their employees and not to any actions or inactions of a shipper or producer of a TIH commodity. Nevertheless, in Canexus' experience, since 2005 the railways have all pursued multi-tiered approaches to significantly limit, or eliminate altogether, the transportation of TIH

commodities on their systems, and/or to limit their liability for accidents that occur while they are hauling TIH commodities. Their efforts have included imposing rail equipment specifications, substantially increasing rail rates, encouraging product substitution, attempting to rationalize their rail networks capable of handling TIH shipments, and last but not least, adopting tariff and contract provisions that transfer liability risks from the railways to the shipper. UP's petition and the tariff provisions it encompasses are yet another example of the railways' attempts to transfer as much of the risks of their transportation of TIH commodities to their customers as possible, and to make it increasingly difficult and expensive to transport TIH commodities by railroad.

Railways have exclusive control over TIH commodities when those products are being transported by them. This control includes design, performance and maintenance of the track; the determination of appropriate operating speeds over the track; the selection and training of who operates the trains; where trains are made up and broken down; what security provisions are implemented and where; whether to install controlled or uncontrolled crossings; how and when to dispatch trains; and where, when and how to switch railcars and trains. The railways' decisions are influenced by appropriate regulatory oversight governing railcar design, routing evaluation and security provisions, amongst other regulations. The shipper also has obligations to comply with government regulation, and assuming it has been compliant with those regulations in tendering its shipment to the railroad and preparing its packaging properly, the shipper has no further ability to influence or control any aspect of the risk of transporting its commodities once its railcars have been taken from the shipper's plant site. Nevertheless, Canexus and other TIH shippers have incurred significant costs to take additional measures to help mitigate the risk of transporting chlorine by railroad, a responsibility Canexus takes very

seriously. Among the measures Canexus has taken include purging older railcars from its chlorine tank car fleet that are made of non-normalized steel, which the industry believes are less resistant to puncture. It has ensured all of its cars are equipped with head shields, double-shelf couplers and constant contact side bearings. It has also installed GPS devices on many of its chlorine tank cars. It has also made other significant investments to convert its entire fleet of chlorine tank cars into the safest, most up-to-date, state-of-the-art rail tank cars available in the industry today. Canexus has also worked with its railways to try and ensure that the routing of its chlorine traffic maximizes safety and efficiency. Canexus also participates in Emergency Response training and educational programs across North America, both on its own initiative and in cooperation with programs hosted by its rail carriers.

Despite incurring substantial costs to help it and the railroads mitigate the risks of hauling chlorine, Canexus has nevertheless incurred even more costs in the form of huge transportation rate increases. Those increases have been in many cases more than 100% over a one-year period and it is not uncommon for chlorine freight rates to now be more than 3 or 4 times higher than they were just five years ago.

In light of the substantial measures TIH shippers take to mitigate the risks of the railroads transporting their products, and the extremely high rates they are charged in addition to taking such measures, it is unreasonable for rail shippers to take on even more risks and costs in the form of broadly indemnifying railways for any liabilities incurred due to any cause other than the sole negligence of the transporting railway. Such further increased costs will necessarily include additional costs for insurance. However, Canexus has found that railways are unable to clearly articulate exactly which risks they seek to shift to the shipper, nor what risks are assumed by the railways' current language. In the face of these uncertainties, it is unclear how much insurance

shippers should expect to have to arrange for and if shippers could even reasonably obtain insurance against all the risks UP or another railway seeks to shift. Shifting insurance costs to customers will result in a windfall to the railways in insurance cost savings, although Canexus' understanding is that the major railways, at least, self-insure. In any event, the lack of clarity raises the risk that insurance customers purchase would not cover all of the liabilities forced on them.

Finally, Canexus believes UP's tariff provisions are contrary to good public policy. TIH commodities such as chlorine are a critical part of the United States economy. The shifting of so much risk and cost to shippers will have a significant impact on chlorine producers by limiting or even eliminating the ability of some chlorine shippers to remain in the marketplace. However, there are very few instances where another product can be easily substituted for chlorine. If the costs and risk of chlorine transportation become so onerous that shipment of it discontinues, the impact on the quality of life and health in the United States would be significant.

### **Conclusion**

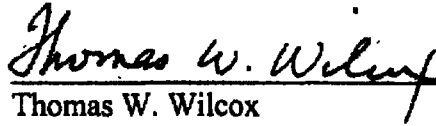
Canexus believes UP's petition is merely the "thin edge of the wedge." If the Board determines that UP's tariff provisions are not unreasonable,<sup>2</sup> other railways will be very quick to implement the same provisions and they may be emboldened by such a ruling to impose other measures and additional costs on shippers. It is not a stretch to believe that within a very short period of time railways could construct a set of provisions that significantly and adversely affect TIH shippers' ability to continue to ship their commodities by rail.

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<sup>2</sup> Canexus is a member of The Chlorine Institute, and adopts the legal arguments made in the Joint Opening Comments of The Chlorine Institute, The American Chemistry Council, The Fertilizer Institute and The National Industrial Transportation League submitted in this docket.

Canexus therefore urges the Board to find UP's Tariff provisions to be unreasonable.

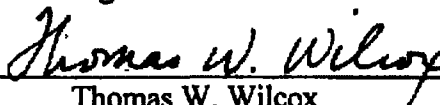
Respectfully submitted,

  
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Thomas W. Wilcox  
*Attorney for Canexus Chemicals Canada, L.P.*

Dated: January 25, 2012

## CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of January, 2012, I served a copy of the foregoing Opening Comments of Canexus Chemicals Canada, L.P. ("Canexus") as well as a copy of the Notice of Intent to Participate previously filed by Canexus with the Surface Transportation Board on December 21, 2011 via email to the following addressees:

  
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